and to section 71(1) of the Probate and Administration Ordinance, 1959, the relevant parts of which read as follows:

"Subject to the provisions of section 60 every contract entered into by a personal representative in exercise of his powers of administering an estate shall be binding on and enforceable against and by the personal representative for the time being of the deceased, . . ."

Mr. Vadiveloo for the defendants submitted that the estate was not liable because the bank was not a creditor of the testator. He submitted that a distinction should be drawn between the old creditors, *i.e.* the creditors before the death of the deceased, and the new creditors, *i.e.* creditors after the death of the deceased. He submitted that as to the old creditors, the estate was liable, but in the case of new debts the estate cannot be liable. He further submitted that the ventures entered into by the executors and trustees were private ventures and the estate cannot be bound by what they did, as the credit was given to them in their capacity as personal representatives, but not to the testator.

Mr. Ball for the plaintiffs submitted that the executors were bound to carry out the terms of the Will and as such the business was lawfully carried out after the death of the testator.

I do not think that the forms referred to on page 9 or section 71(1) of the Probate and Administration Ordinance, 1959 are of any assistance in the case before the court. All that these indicate is that an action lies against a personal representative, but nowhere does there appear to be any right given to a creditor to prove debts against the estate in a contract entered into after the death of the deceased by the personal representatives.

The following passage from *Chitty* on Contracts (23rd Edition), Volume 1, page 503, paragraph 1080, summarises the position as to the liability of an executor carrying on business of the testator:

"Unless empowered to do so by the testator's will, an executor is not entitled to carry on the testator's business, except for the purpose of winding it up. *If he does carry it on, whether with or without authority, he is personally liable upon the contracts he makes, and persons contracting with him have no remedy against the testator's assets.* The executor, if he has carried on the business in accordance with his duty, has a right to be indemnified out of the estate and any profits made belong to the estate. He is not, however, entitled to be indemnified out of the estate, in priority to the testator's creditors, even when empowered by the will to carry on the business, unless they consent to its being carried on. The fact that the creditors stand by with knowledge that it is being carried on without interference is not of itself sufficient to show consent. Executors who carried on their testator's business under the powers of his will in the same firm name as before were held not to be partners, though no doubt joint debtors."

I rule that the three defendants as executors and trustees are personally liable upon the contract that they entered into with the plaintiffs after the death of the deceased and that the plaintiffs have no remedy against the estate of the deceased. The action is therefore dismissed with costs.

Action dismissed.

Solicitors: *Bashir & Co.; G. Vadiveloo.*

TIONG CHI SENG & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Tan Chiaw Thong J.) May 8, 1973]

[Sibu — Criminal Appeal No. 5 of 1972]

Criminal Law and Procedure — Sentence — Charge of assisting in carrying on a public lottery — Documentary evidence — Failure to explain significance of such evidence — Principles on which appealate court will interfere with sentence.

The appellants had been convicted of the offence of assisting in carrying on a public lottery and sentenced to one week's imprisonment and a fine of $1,600.00. They appealed against their sentence.

Held: as the full significance of the documentary exhibits in this case had not been shown, and in the circumstances of this case and in view of the fact that the appellants were first offenders, the sentence of imprisonment imposed on them should be quashed.

Cases referred to:-

(1) *Yap Teng Chai* v. *Public Prosecutor* [1959] M.L.J. 205.

(2) *Abdul Karim* v. *Reg.* [1954] M.L.J. 86.

(3) *R.* v. *Ball* (1951) 35 Cr. App. R. 164.

(4) *Abu Bakar bin Alif* v. *R.* [1953] M.L.J. 19 at p. 20.

(5) *Kang Yeow Hooi and others* v. *Public Prosecutor* [1954] M.L.J. 233.

(6) *Wong Liang Nguk* v. *Public Prosecutor* [1953] M.L.J. 247.

(7) *R.* v. *Cargill* (1913) 8 Cr. App. R. 224.

CRIMINAL APPEAL.

C. T. Wong for the appellants.

Anthony Tai (Deputy Public Prosecutor) for the defendant.

Tan Chiaw Thong J.: In this case the two appellants together with three other accused pleaded guilty to a charge of assisting in carrying on a public lottery. In outlining the facts relating to the charge, the prosecution tendered certain documentary exhibits. Although it was alleged by the prosecution that all the exhibits were concerned with the offence specified in the charge, it seems clear that at least two of them, namely, three cheques (Ex. P13) and an agreement (Ex. P9) relating to the formation of a syndicate for the collection of funds and investment thereof were not shown to have any connection with the charge. No attempt was made to explain the other exhibits in relation to the charge and although it was stated by the prosecution as to what they were, no evidence was placed before the court as to their full significance particularly with regard to the magnitude of the illegal four digits lottery that was alleged to have taken place. The court was not therefore in a position to appreciate the full gravity of the offence charged. In a case of this sort where the documents do not speak or do not fully speak for themselves, it is incumbent on the prosecution to explain the significance of each and every exhibit tendered so as to enable the court to appreciate their full significance in relation to the charge before it.

The two appellants who were the first and fifth accused in the case originally appealed against both conviction and sentence. At the outset of the hearing, counsel for both appellants indicated that the appellants were abandoning their appeal against conviction and the appeal thus proceeded as one against sentence

only. The appellants who were each sentenced to one week's imprisonment and a fine of $1,600 appeal on the following grounds: —

(1) That the learned trial magistrate erred in principle in imposing such manifestly excessive sentences on the appellants while the other three co-accused had got away with moderate and fair sentences, though they had been convicted of the same offences that is assisting in carrying on a public lottery by selling illegal 4-digits lottery tickets to the public.

(2) That the sentences imposed by the learned trial magistrate are not only manifestly excessive but also unprecedented in this type of cases.

The principles on which an appellate court acts in an appeal against sentence are well established. I can do no better than quote certain extracts from the judgment of Hepworth J. in the case of *Yap Teng Chai* v. *Public Prosecutor*: [1]

"Now an appellate court should not alter a sentence merely because the members of the court might have passed a different sentence. (*Abu Bakar bin Alif* v. *Rex*). The sentence of the court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. (*Public Prosecutor* v. *Fam Kim Hock*). When the sentence of a court of first instance is varied by an appellate court it is in the majority of cases, as in the present case, because the sentence is unsuitable to the proved facts and circumstances....

In general I take the view that a sentence should be either a sentence of imprisonment or a sentence of fine and not both. Again speaking generally cases in which a sentence of imprisonment and fine might, in my opinion, fairly be imposed are cases of serious revenue offences and in the case of offences which are not *mala per se* but where it has become apparent that sentences of fine only on other persons in the area in respect of similar offence in the recent past have been insufficient to act as a deterrent."

One important matter is that the facts and circumstances of each individual case must be considered. This is emphasized in section 274 of the Criminal Procedure Code which provides, *inter alia*, that —

"No judgment or order of a court of a magistrate shall be reversed or set aside unless it is shown to the satisfaction of the court above that such judgment or order is wrong in law or unreasonable or cannot be supported having regard to the evidence or would result in a miscarriage of justice or, *in the case of a sentence, is inappropriate in the circumstances of the case.*" (Italics added).

As Brown Ag. C.J. said in the case of *Abdul Karim* v. *Regina*: —[2]

"In the matter of punishment, the 'type of offence' is the concern of the Legislature, which has provided the maximum punishment which can be inflicted for a serious offence of that type. The particular offence, and the particular offender, are the concern of the court, whose business it is to decide what punishment is merited upon the facts of the individual case within the limits which the Legislature has provided...."

The principles relating to punishment for a criminal offence are also well known. The object of punishment is stated by the learned editors of *Halsbury's* Laws of England, Third Edition, Vol. 10 at page 487 paragraph 889 as follows: —

"The object of punishment is the prevention of crime, and every punishment is intended to have a double effect, namely, to prevent the person who has committed a crime from repeating the act or omission and to prevent other members of the community from committing similar crimes.

As regards the particular offender there are three ways of providing by punishment against the recurrence of an offence:

(1) by taking from him the power of offending (incapacitation);

(2) by taking away the desire of offending (reformation);

(3) by making him afraid of offending (intimidation).

In some cases, besides providing for the prevention of crimes in future, punishment may also include reparation for the past injury by ordering the offender to compensate the person injured.

As regards other members of the community who are disposed to commit similar offences, the only way of providing by punishment against the commission of the offence is by the deterrent effect which the punishment of an individual has upon others."

In *R.* v. *Ball*[3] at page 165 it was stated that —

"In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

It is for these reasons, and with these purposes in view, that before passing sentence the court hears evidence of the antecedents and character of every convicted person. It follows that when two persons are convicted together of a crime or series of crimes in which they have been acting in concert, it may be right, and very often is right, to discriminate between the two and to be lenient to the one and not to the other. The background, antecedents and character of the one and his whole bearing in court may indicate a chance of reform if leniency is extended, whereas it may seem that only a harsh lesson is likely to make the other stop in his criminal career."

It is important that before sentencing a convicted persons, the trial court should try to obtain information on his background, antecedents and character since these are relevant considerations on the question of sentence. This has been emphasized many a time and in the case of *Abu Bakar bin Alif* v. *R.*[4] Spenser Wilkinson J. said: —

"I desire to emphasise the importance of magistrates calling for evidence or information regarding the background, antecedents and character before passing sentence on a convicted person and of the prosecution making available as much information thereon as possible."

In this case there was no information before the court on these matters and neither has the prosecution given any assistance to the court in this regard. The record shows that, before sentencing the appellants and the other three accused, the learned trial magistrate did ask all the accused whether they had anything to say before sentence was imposed, to which all the accused stated that they had nothing to say. It must be remembered that the accused were not represented at the trial and it is probable that the significance of the question asked by the learned trial magistrate was not apparent to them. It was because of this considera-

tion that I allowed counsel for the appellants to give the court information relating to the background, antecedents and character of the appellants.

I now come back to the grounds of appeal as specified above. The first ground alleges that the trial magistrate has erred in principle because sentences imposed upon the appellants were manifestly excessive in that lighter sentences were imposed upon the other three accused when all were involved in the same offence. As to this I need only quote from *R.* v. *Ball* where at page 166 it was stated that —

"Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

It is for these reasons, and with these purposes in view, that before passing sentence the court hears evidence of the antecedents and character of every convicted person. It follows that when two persons are convicted together of a crime or series of crimes in which they have been acting in concert, it may be right, and very often is right, to discriminate between the two and to be lenient to the one and not to the other."

In this case the learned trial magistrate did distinguish between the other three accused and the two appellants as is clear from what was stated by the following: —

"2nd accused was an employee of the 1st accused. 3rd accused was jobless, 4th accused is the son of the 1st accused. They are all young."

I am not prepared to say that these are improper considerations in this particular case in view of the fact that fines were imposed upon the other three accused and no doubt the trial magistrate had in view the principle that the quantum of the fines imposed should act as a deterrent to these particular accused from committing the crime again or induce them to turn from criminal ways to honest living. The point has been made by counsel for the appellants that the appellants should not be singled out from the other three accused because they were older than the other three accused and that there was no evidence for the statement of the learned trial magistrate that they had "operated" the illegal lottery. He further argued that whereas the charge was concerned with the assisting of the carrying on a public lottery, the learned trial magistrate had misdirected himself by using the word "operated" which connotes management itself. As to this, I would point out that although the word "operated" was used there was nothing in the record to show that the trial magistrate had for the purpose of sentence misdirected his mind to the charge before him. In any event, a charge of assisting in the carrying on, and one of the management, of a public lottery carry the same penalty under section 4(c) of the Gambling Ordinance (Cap. 138). Further, bearing in mind the principles which have been set out above relating to punishment, I am not prepared to say that it was wrong for the magistrate to distinguish between the appellants and the other three accused because of the difference in their ages. On the second ground of appeal, counsel for the appellants made the point that the learned trial magistrate did not take into consideration whether the offence charged was *mala per se*. In *Kang Yeow Hooi & Ors.* v. *Public Prosecutor*[5] which was a criminal reference in relation to a charge of assisting in carrying on a 100, 1,000, and 10,000 character public lottery in contravention of section 4(i)(c) of the West Malaysian Common Gaming Houses Enactment (Cap. 47), the Court of Appeal stated that —

"We do not consider that a sentence of imprisonment for offences of this kind necessarily provide a deterrent, and consideration should always be given to the imposition of a substantial fine with a view to avoiding the necessity of sending persons to prison who have committed offences which are not *mala per se*."

It is to be noted that the court was not laying down any general rule but was stating a consideration which should be borne in mind before sentencing an accused person who has been convicted of a lottery offence. The record shows that the illegal sale of four digits is prevalent in Sibu and I would point out that whilst it may be true that an offence such as the one mentioned was not *mala per se*, the Court of Appeal in *Kang Yeow Hooi's* case did not say that in no such case should a sentence of imprisonment be imposed. This is obvious and indeed the penalty prescribed for such an offence carries a maximum term of imprisonment for one year and a fine of $2,000. In the case of *Wong Liang Nguk* v. *Public Prosecutor*,[6] Thomson J (as he then was) in relation to an appeal regarding an offence of assisting in the carrying on a public lottery at page 248 said: —

"But there is no doubt that at the present time it is being carried on in such a widespread way that the law itself is being brought into contempt, and it is my duty to do all in my power to see that that does not happen. If the law continues to be widely and publicly flouted, as it is being flouted, magistrates before whom these cases come will have to give serious consideration to sending offenders to prison, and sending them to prison for long periods."

In this case the record shows that despite heavy fines, cases relating to the illegal sale of four digits continue to come before the courts in Sibu. The learned trial magistrate therefore, with the deterrent factor in view, imposed a term of imprisonment on the appellants. The question therefore arises as to whether in view of the circumstances of this particular case he was correct in doing so. While not minimizing in any way the consideration that the punishment should have a deterrent effect upon others particularly in view of the prevalence of this type of offence in Sibu, I think that the deterrent effect of the punishment upon the particular accused himself should also be borne in mind. As has been pointed out at the outset, if there had been satisfactory information or evidence before the court showing clearly the magnitude of the illegal lottery involved in this case, I would have no hesitation in dismissing the appeal particularly against the first accused who has not challenged the allegation of the prosecution that he had admitted to the police that he would pay off the draws. This statement shows the extent to which he was involved.

The learned trial magistrate stated that the appellants were involved in this illegal activity on a fairly large scale. Presumably he was basing his conclusion on the documentary exhibits before him but as I have stated information on the full significance of these exhibits was lacking. To my mind this is an important but unsatisfactory aspect of the case and I resolve this in favour of the appellants.

In regard to the first appellant it has been shown that he was playing a no small part in relation to the offence charged. He is a first offender and after anxious

consideration of all the circumstances, I quash the sentence of imprisonment imposed upon him and increase his fine to one of $2,000 which is the maximum allowed under the law. In default, he will go to prison for 9 months.

As regards the second appellant, the point has been made that he is a man of good character who has some social standing in the local society. I would point out that his social standing is no ground for interfering with the sentence and neither is any social stigma resulting from conviction and sentence. In the case of *R.* v. *Cargill,*[7] the English Court of Criminal Appeal said at page 231: —

"In addition to this it is very desirable, if possible, to pass a sentence on a man in a good position exactly the same as on a man in a different position; it is true the sentence is harder, but the offence is correspondingly greater; the man ought to know better and the way of meeting that is to give exactly the same sentence; the sentence is worse, but, by reason of the prisoner's position, the offence is worse."

The record of the lower court shows that he was not involved in the offence to such a degree as the first appellant and in all the circumstances since I had quashed the sentence of imprisonment upon the first appellant, the sentence of imprisonment upon the second appellant is also quashed. The sentence of fine is affirmed and I vary the order of the magistrate to the extent that in default of the payment of fine, the second appellant shall go to prison for 6 months.

Lest it be thought that an offence of this sort will not attract a sentence of imprisonment, I would make it clear that, where the circumstances warrant it, the courts can, and will, impose sentences of imprisonment.

Order accordingly.

SINGAH MOHAMED HUSSIN v. PUBLIC PROSECUTOR

[A.Cr.J. (Syed Othman J.) May 26, 1973]

[Kuantan — Criminal Appeal No. 9 of 1972]

Criminal Law and Procedure — Amendment of charge after close of defence — Amended charges not read over and explained to accused — Whether irregularity curable — Criminal Procedure Code (Cap. 6), ss. 158(ii) and 422.

In this case the appellant had been charged under section 414 of the Penal Code on two charges that he "voluntarily disposed" of certain properties. At the close of the defence, the learned magistrate ordered the charges to be amended by substituting the words "assisted in disposing of" for the words "disposed" but he did not read over and explain the amended charges to the appellant. The appellant appealed against his conviction and sentence.

Held: (1) the omission by the learned magistrate to read and explain the amended charges to the appellant was an irregularity which was not curable by section 422 of the Criminal Procedure Code as it was contrary to a statutory requirement;

(2) the conviction and sentence of the appellant must therefore be quashed and a retrial ordered.

Cases referred to:-

(1) *Chong Chee Fah* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 45,

(2) *Public Prosecutor* v. *Ong Eng Kiat* [1947] M.L.J. 180.

(3) *Govindasamy* v. *Public Prosecutor* [1949] M.L.J. 101.

(4) *Lim Tuan Heng* v. *Hermann Jebson & Co.* (1885) 4 Ky. 78.

CRIMINAL APPEAL.

N. Ramachandaran for the appellant.

Ahmad bin Abdul (Deputy Public Prosecutor) for the respondent.

Syed Othman J.: The appellant was convicted by the magistrate at Temerloh of two offences under section 414 of the Penal Code and sentenced on each charge to a fine of $900 in default 6 months imprisonment.

The appeal is on a point of law as to the procedure adopted by the learned magistrate after amending the charges at the close of the defence.

Each of the charges against the appellant read:

"That you ... voluntarily disposed of property to wit, a cheque ... which you had reason to believe to be stolen property and that you have thereby committed an offence under section 414 of the Penal Code."

The offence which section 414 of the Penal Code creates so far as applicable to this case is "assists in the disposal of property..." and not "disposes of property..." as appearing in the charges.

On the evidence adduced by the prosecution the defence was called. At the close of the defence, according to the record, the learned magistrate noted to the effect that he had overlooked a point and that the charges ought to have been amended by substituting the words "assisted in disposing of" for the word "disposed". The learned magistrate then amended the charges and convicted the appellant. The record does not show that the learned magistrate had read over and explained the amended charges to the appellant. Section 158(ii) of the Criminal Procedure Code (the Code) provides that every alteration and addition to the charge "shall be read and explained to the accused."

The question to be determined is what is the effect of a trial which did not comply with this provision.

For the appellant it is mainly argued, relying on *Chong Chee Fah* v. *Public Prosecutor,*[1] that the trial was a nullity. In this case the appellant was charged with "assisting in the management of a public lottery" under section 4(i)(c) of the Common Gaming Houses Enactment (Cap. 47). It was held that as there was no such offence under the section the trial was a nullity, and as the proceedings in the court below were a nullity, a retrial could not be ordered.

For the respondent it is argued that the omission by the learned magistrate to comply with section 158(ii) is curable by section 422 of the Code which reads, so far as applicable to the present case:

"Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account — of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceeding under this Code; or

....

unless such error, omission... has occasioned a failure of justice."